

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED  
STATES DEPARTMENT OF JUSTICE REVISED MODEL CERCLA SECTION  
122(h)(1) CASHOUT AGREEMENT FOR PERIPHERAL PARTY SETTLEMENTS  
NOT BASED UPON ABILITY TO PAY**

January 8, 2004

**[NOTE: This revised model supersedes the “Model CERCLA Section 122(h)(1) Cashout Agreement for Peripheral Party Settlements Not Based on Ability to Pay” that was issued as Appendix C to the September 30, 1998 “Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority.”]**

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and U.S. Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.

**REVISED MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT  
FOR PERIPHERAL PARTY SETTLEMENTS NOT BASED UPON ABILITY TO PAY**

**TABLE OF CONTENTS**

I.	<u>JURISDICTION</u>	3
II.	<u>BACKGROUND</u>	4
III.	<u>PARTIES BOUND</u>	4
IV.	<u>STATEMENT OF PURPOSE</u>	4
I.	<u>DEFINITIONS</u>	5
VI.	<u>PAYMENT OF RESPONSE COSTS</u>	6
VII.	<u>FAILURE TO COMPLY WITH AGREEMENT</u>	9
VIII.	<u>COVENANT NOT TO SUE BY EPA.</u>	11
IX.	<u>RESERVATIONS OF RIGHTS BY EPA</u>	12
X.	<u>COVENANT NOT TO SUE BY SETTLING PARTIES.</u>	13
XI.	<u>EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION</u>	14
—.	<u>[SITE ACCESS]</u>	15
—.	<u>[ACCESS TO INFORMATION]</u>	16
—.	<u>[RETENTION OF RECORDS]</u>	17
XIII.	<u>CERTIFICATION</u>	17
XIV.	<u>NOTICES AND SUBMISSIONS</u>	18
XV.	<u>INTEGRATION[/APPENDICES]</u>	18
XVI.	<u>PUBLIC COMMENT</u>	18
XVII.	<u>EFFECTIVE DATE</u>	19

**REVISED MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT  
FOR PERIPHERAL PARTY SETTLEMENTS NOT BASED UPON ABILITY TO PAY**

IN THE MATTER OF:	)	AGREEMENT
	)	
Site Name]	)	U.S. EPA Region ____
[City, County, State]	)	CERCLA Docket No. ____
	)	
[Names of Settling Parties]	)	PROCEEDING UNDER SECTION
SETTLING PARTIES	)	122(h)(1) OF CERCLA
_____	)	42 U.S.C. §9622(h)(1)

**I. JURISDICTION**

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to [insert reference to any Regional redelegation]. This Agreement is also entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States, which authority, in the circumstances of this settlement, has been delegated to [check with DOJ contact to determine appropriate DOJ official].

2. This Agreement is made and entered into by EPA [,] [and] [insert names or reference attached appendix listing settling parties] (“Settling Parties”)[, and insert names or reference attached appendix listing settling federal agencies (“Settling Federal Agencies”)]. Each Settling Party consents to and will not contest the authority of the United States [if Settling Federal Agencies, insert, “, and each Settling Federal Agency consents to and will not contest the authority of EPA,”] to enter into this Agreement or to implement or enforce its terms.

**II. BACKGROUND**

3. This Agreement concerns the [insert Site name] (“Site”) located in [insert Site location]. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and [will/may] undertake additional response actions in the future. **[NOTE: A brief description of the release or threatened release and of the response actions taken or to be taken by EPA or potentially responsible parties may be included.]**

5. In performing response action at the Site, EPA has incurred response costs and will incur additional response costs in the future.

6. EPA alleges that Settling Parties [if Setting Federal Agencies, insert, “and Settling Federal Agencies”] are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred and to be incurred at the Site.

7. EPA and Settling Parties [if Setting Federal Agencies, insert, “and Settling Federal Agencies”] recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Parties [and Settling Federal Agencies] in accordance with this Agreement do not constitute an admission of any liability by any Settling Party [or any Settling Federal Agency]. Settling Parties [and Settling Federal Agencies] do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in this Section.

### **III. PARTIES BOUND**

8. This Agreement shall be binding upon EPA [if Setting Federal Agencies, insert, “and Settling Federal Agencies”] and upon Settling Parties and their [heirs,] successors and assigns. Any change in ownership or corporate or other legal status of a Settling Party, including but not limited to any transfer of assets or real or personal property, shall in no way alter such Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

### **IV. STATEMENT OF PURPOSE**

**[EXPLANATORY NOTE ON SETTLEMENT OPTIONS UNDER THIS MODEL: In exchange for the covenant not to sue provided in Section VIII of this Agreement, peripheral party cashout settlements should address the risk of cost overruns during performance of response action at the Site through one of three means:**

**1) payment of an up-front premium;**

**2) agreement to pay a percentage of actual future costs upon receipt of one or more future bills if total response costs exceed the estimate upon which Settling Parties' payment is based, as shown in the Payment of Additional Response Costs provision in the Appendix to this model; or**

**3) inclusion of the cost overrun reservation of rights shown in Subparagraph 20(f) below, which preserves EPA's ability to seek additional response costs or performance of response**

**action from Settling Parties if total response costs at the Site exceed the estimate upon which Settling Parties' payment is based.]**

9. By entering into this Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing Settling Parties [if Settling Federal Agencies, insert, "and Settling Federal Agencies"] to make a cash payment [, which includes a premium,] to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607 [, and under Section 7003 of RCRA, 42 U.S.C. § 6973], with regard to the Site as provided in the Covenant Not to Sue by EPA in Section VIII [if Settling Federal Agencies, delete "Not to Sue"], subject to the Reservations of Rights by EPA in Section IX [if Settling Federal Agencies, insert, "], and as provided in the Covenant Not to Sue by Settling Parties in Section X"].

## **V. DEFINITIONS**

10. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

e. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.<sup>1</sup>

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<sup>1</sup> The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at [http://www.epa.gov/budget/finstatement/superfund/int\\_rate.htm](http://www.epa.gov/budget/finstatement/superfund/int_rate.htm).

**[NOTE: Insert the following definition if the optional Site Access provision is used.]** [\_\_\_]. “Owner Settling Parties” shall mean [insert names of Settling Parties who are Site owners.]

f. “Paragraph” shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

g. “Parties” shall mean EPA [, and] Settling Parties[, and Settling Federal Agencies.].

h. “RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

i. “Section” shall mean a portion of this Agreement identified by a Roman numeral.

**[If Settling Federal Agencies, insert the following definition.]** [\_\_\_]. “Settling Federal Agencies” shall mean [insert names of settling federal agencies, or if numerous, “those departments, agencies, and instrumentalities of the United States identified in Appendix \_\_\_.”]

j. “Settling Parties” shall mean [insert names of settling non-federal parties, or if numerous, “those parties identified in Appendix \_\_\_.”]

k. “Site” shall mean the \_\_\_\_\_ Superfund site, encompassing approximately \_\_\_\_\_ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either “generally shown on the map included in Appendix \_\_\_” or “generally designated by the following property description: \_\_\_\_\_.”]

l. “United States” shall mean the United States of America, including its departments, agencies, and instrumentalities.

## **VI. PAYMENT OF RESPONSE COSTS**

11. Within 30 days after the effective date of this Agreement as defined by Paragraph 32, Settling Parties shall pay to the EPA Hazardous Substance Superfund \$\_\_\_\_\_, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment.

**[NOTE: As an alternative to calculation and payment of interest from the Past Response Costs date through the date of payment, the following alternative Paragraph 11 may be used if Settling Parties agree to place the payment amount (plus accrued Interest from the Past Response Costs date through the date the escrow account is created) into an interest-bearing escrow account to be disbursed to EPA upon the effective date of the Agreement.]**

[11. Within 5 business days after Settling Parties receive notice from EPA that this Agreement has been signed by EPA (if DOJ approval is needed, insert “and approved by the Attorney General or his/her designee”), Settling Parties shall deposit \$ \_\_\_\_\_ into an escrow account bearing interest on commercially reasonable terms, in a federally-chartered bank (the “Escrow Account”). If the Agreement is not made effective after public comment, the monies placed in escrow, together with accrued interest thereon, shall be returned to Settling Parties. If the Agreement is made effective after public comment, Settling Parties shall, within 15 days thereof, cause the monies in the Escrow Account to be paid to EPA in accordance with Paragraph 12 below.]

**12. [NOTE: The following language should be used if the payment amount is above \$25,000. Regional attorneys should consult with the Comptroller’s Office in the Region to determine if more specific EFT instructions should be included.]** Payment [if Settling Federal Agencies, insert “by Settling Parties”] shall be made to EPA by Electronic Funds Transfer (“EFT”) in accordance with current EFT procedures to be provided to Settling Parties by EPA Region \_\_, and shall be accompanied by a statement identifying the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID # \_\_\_\_\_, and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below \$25,000.]** Payments [if Settling Federal Agencies, insert “by Settling Parties”] shall be made by certified or cashier's check made payable to “EPA Hazardous Substance Superfund.” Each check, or a letter accompanying each check, shall identify the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID # \_\_\_\_\_, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

At the time of payment, each Settling Party shall also send notice that payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID # \_\_\_\_\_ and the EPA docket number for this action.

13. The total amount to be paid by Settling Parties pursuant to Paragraph 11 shall be deposited by EPA in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

**[NOTE ON SPECIAL ACCOUNTS: Payments made under Paragraph 11 may be deposited in the Hazardous Substance Superfund or may be deposited in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as**

a “reimbursable account”).<sup>2</sup> The Agreement should include clear instructions indicating which portion of the payment is to be deposited in the Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Under Paragraph 13 as written, 100% of the payment will be deposited in a special account. The following language may be substituted if all or part of the payment will be deposited in the EPA Hazardous Substance Superfund.]

**[If the entire payment will be deposited by EPA in the EPA Hazardous Substance Superfund:]**

“The total amount to be paid by Settling Parties pursuant to Paragraph 11 shall be deposited by EPA in the EPA Hazardous Substance Superfund.”

**[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]**

“Of the total amount to be paid by Settling Parties pursuant to Paragraph 11 of this Agreement, [‘\$ \_\_\_\_’ or ‘\_\_\_\_%’] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [‘\$ \_\_\_\_’ or ‘\_\_\_\_%’] shall be deposited by EPA in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

**[If Settling Federal Agencies are making payments, insert the following paragraph.]**

[13.1. As soon as reasonably practicable after the effective date of this Agreement[, and consistent with Paragraph 13.1(a)(iii),] the United States, on behalf of Settling Federal Agencies, shall:

[a](i). Pay to the EPA \$ \_\_\_\_, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment.

[a](ii). The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 13.1(a)(i) shall be deposited by EPA in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. **[Insert one of the following alternative instructions if part or all of the Settling Federal Agencies’ payment will be deposited in the EPA Hazardous Substance Superfund:]**

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<sup>2</sup> When PRPs are performing the response action at the Site, payments may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account.



“The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 13.1(a)(i) shall be deposited by EPA in the EPA Hazardous Substance Superfund.”

“Of the total amount to be paid by Settling Federal Agencies pursuant to Paragraph 13.1(a)(i), [‘\$\_\_\_\_\_’ or ‘\_\_\_\_\_%’] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [‘\$\_\_\_\_\_’ or ‘\_\_\_\_\_%’] shall be deposited by EPA in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

[a](iii). If the payment to EPA required by this Paragraph 13.1(a)(i) is not made as soon as reasonably practicable, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the effective date of this Agreement, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with a letter agreement dated December 28, 1998.

[b.] Pay to the Settling Parties \$ \_\_\_\_\_, in reimbursement of Settling Parties’ past and future response costs at the Site, by ACH Electronic Funds Transfer in accordance with instructions provided by Settling Parties.

13.2. The Parties to this Agreement recognize and acknowledge that the payment obligations of Settling Federal Agencies under this Agreement can only be paid from appropriated funds legally available for such purpose. Nothing in this Agreement shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.]

**[NOTE: If Settling Parties (or Settling Federal Agencies) have agreed to pay a percentage of actual future costs upon receipt of one or more future bills (option 2 of the Explanatory Note in Section IV), insert the Additional Response Costs language provided in the Appendix to this model.]**

## **VII. FAILURE TO COMPLY WITH AGREEMENT**

14. Interest on Late Payments. If any Settling Party fails to make any payment required by Paragraph 11 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

15. Stipulated Penalty.

a. If any amounts due to EPA under Paragraph 11 are not paid by the required date, Settling Parties shall be in violation of this Agreement and shall pay to EPA, as a stipulated

penalty, in addition to the Interest required by Paragraph 14, \$\_\_\_\_\_ per violation per day that such payment is late.

**[NOTE: If the Agreement includes any non-payment obligations for which a stipulated penalty is due, insert, “If Settling Parties do not comply with [reference sections containing non-payment obligations], Settling Parties shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, \$\_\_\_\_\_ per violation per day of such noncompliance.” Escalating penalty payment schedules may be used for payment or non-payment obligations.]**

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall identify the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID # \_\_\_\_\_, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

c. At the time of each payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall identify the EPA Region and Site-Spill ID # \_\_\_\_\_ and the EPA Docket Number for this action.

d. Penalties shall accrue as provided above regardless of whether EPA has notified Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment obligations are included, insert “or performance”] is due [if non-payment obligations are included, insert “, or the day a violation occurs,”] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, “or the final day of correction of the noncompliance or completion of the activity.”] Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

16. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Parties’ failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with any term or condition of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

17. The obligations of Settling Parties to pay amounts owed to EPA under this Agreement are joint and several. In the event of the failure of any one or more Settling Parties to make the

payments required under this Agreement, the remaining Settling Parties shall be responsible for such payments.

18. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Settling Parties' payment of stipulated penalties shall not excuse Settling Parties from payment as required by Section VI or from performance of any other requirements of this Agreement.

### **VIII. COVENANT NOT TO SUE BY EPA**

**[NOTE: If Settling Federal Agencies are making payments, delete "Not to Sue" from the title of this Section.]**

19. Covenant Not to Sue [if Settling Federal Agencies, insert, "Settling Parties"] by EPA. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Settling Parties pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. 6973,]<sup>3</sup> with regard to the Site.<sup>4</sup> With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all amounts required by Section VI (Payment of Response Costs) [if Payment of Additional Response Cost provision is used, reference only those paragraphs within Section VI that do not include Additional Response Costs] and any amount due under Section VII (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

**[NOTE: If Settling Federal Agencies are making payments and qualify for peripheral party status at the Site, insert the following covenant. If they do not qualify for peripheral party status, the scope of the covenant will require case-specific discussion.]**

[19.1. Covenant for Settling Federal Agencies by EPA. Except as specifically provided in Paragraph 20 (Reservation of Rights by EPA), EPA covenants not to take administrative action against Settling Federal Agencies pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,] with regard to the Site.<sup>5</sup> With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all payments required by Section VI (Payment of Response Costs) [if Payment of Additional Response Cost Provision is used, reference only those paragraphs within Section VI that do not

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<sup>3</sup> Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

<sup>4</sup> This covenant assumes that EPA has decided to grant a full covenant not to sue for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed.

<sup>5</sup> See n. 3 and 4 *supra*.

include Additional Response Costs]. This covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Agreement. This covenant extends only to Settling Federal Agencies and does not extend to any other person.]

### **IX. RESERVATIONS OF RIGHTS BY EPA**

20. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties [if Settling Federal Agencies, insert, “and Settling Federal Agencies”] with respect to all matters not expressly included within the Covenant Not to Sue [if Settling Federal Agencies, delete “Not to Sue”] by EPA in Paragraph 19 [if Settling Federal Agencies, insert “and the Covenant for Settling Federal Agencies by EPA in Paragraph 19.1.”]. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Parties [if Settling Federal Agencies, insert “and EPA reserves and this Agreement is without prejudice to, all rights against Settling Federal Agencies,”] with respect to:

a. liability for failure of Settling Parties [or Settling Federal Agencies] to meet a requirement of this Agreement;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

**[NOTE: The precise terms of Subparagraph (d) may need to be changed for any Settling Party who has a continuing relationship with the Site.]** d. liability, based upon Settling Parties’ [or Settling Federal Agencies’] ownership or operation of the Site, or upon Settling Parties’ [or Settling Federal Agencies’] transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Agreement by Settling Parties [or Settling Federal Agencies]; [and]

e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site; [and]

**[NOTE: Insert Subparagraph (f) if Settling Parties (or Settling Federal Agencies) have not agreed in Section VI (Reimbursement of Response Costs) to compensate EPA for the costs described in Subparagraph (f) through a premium payment or through an Additional Response Cost billing procedure as shown in the Appendix to this model.]** [f. liability for performance of response action or for reimbursement of response costs if total response costs incurred or to be incurred at or in connection with the Site by the United States or any other person exceed \$\_\_\_\_\_ [insert total response cost estimate upon which Settling Parties’ payment is based].

21. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Agreement.

#### **X. COVENANT NOT TO SUE BY SETTLING PARTIES**

22. Settling Parties covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site<sup>6</sup> or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.<sup>7</sup>

Except as provided in Paragraph 24 (Waiver of Claims) and Paragraph 27 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 20(c) - (f), but only to the extent that Settling Parties' claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

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<sup>6</sup> If the Agreement does not cover the Site as a whole, the reference to "the Site" here and in Subparagraphs 22(b) and (c) should be narrowed to conform to the intended scope of the Agreement.

<sup>7</sup> The settlement should, wherever possible, release or resolve any claims by Settling Parties against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be revised to allow private parties to reserve specifically delineated rights to seek contribution against the United States.

23. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

24. Settling Parties agree not to assert any claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any other person. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Party.

#### **XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

25. Except as provided in Paragraph 24, nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

26. The Parties agree that Settling Parties [if Settling Federal Agencies, insert, “and Settling Federal Agencies”] are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Agreement. The “matters addressed” in this Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or by any other person. The “matters addressed” in this Agreement do not include those response costs or response actions as to which EPA has reserved its rights under this Agreement (except for claims for failure to comply with this Agreement), in the event that EPA asserts rights against Settling Parties [or Settling Federal Agencies] coming within the scope of such reservations.<sup>8</sup>

27. In any subsequent administrative or judicial proceeding initiated by EPA, or the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Parties [and Settling Federal Agencies] shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by EPA, or the United States on behalf of EPA, in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the

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<sup>8</sup> This definition of “matters addressed” assumes that this Agreement is designed to resolve fully Settling Parties’ [and Settling Federal Agencies’] liability at the Site pursuant to Sections 106 and 107(a) of CERCLA, subject only to the reservations of rights. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed.

enforceability of the Covenant Not to Sue by EPA [if Settling Federal Agencies, delete “Not to Sue”] set forth in Section VIII.

**[\_\_\_. SITE ACCESS]<sup>9</sup>**

[\_\_\_. Commencing upon the effective date of this Agreement, Owner Settling Parties agree to provide EPA and its representatives and contractors access at all reasonable times to the Site and to any other property owned or controlled by Owner Settling Parties to which access is determined by EPA to be required for the implementation of this Agreement, or for the purpose of conducting any response activity related to the Site, including but not limited to:

- a. Monitoring, investigation, removal, remedial or other activities at the Site;
- b. Verifying any data or information submitted to EPA;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing response actions at or near the Site; [and]
- [f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Parties or their agents, consistent with Section \_\_\_ (Access to Information).]

\_\_\_ Notwithstanding any provision of this Agreement, EPA retain[s] all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.]

**[\_\_\_. ACCESS TO INFORMATION]<sup>10</sup>**

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<sup>9</sup> Include this Section if 1) access to the Site may be needed and 2) the Site owner is a Settling Party or a Settling Party controls access to the Site or to any other property to which access is needed. If any of the Settling Parties will need to provide institutional controls as part of a response action, include such a provision here. Model language may be found in Section IX of the Revised Model RD/RA Consent Decree (June 12, 2001, or more recent update).

<sup>10</sup> Include this Section only if Settling Parties have been or will be involved in cleanup efforts at the Site or if Settling Parties may possess information that may assist the Agency in its cleanup or enforcement efforts.

[\_\_]. Settling Parties shall provide to EPA, upon request, copies of all records, reports, or information (hereinafter referred to as “records”) within their possession or control or that of their contractors or agents relating to activities at the Site [if needed, include “or to the implementation of this Agreement”], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

\_\_\_ Confidential Business Information and Privileged Documents.

a. Settling Parties may assert business confidentiality claims covering part or all of the records submitted to EPA under this Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA, or if EPA has notified Settling Parties that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such documents or information without further notice to Settling Parties.

b. Settling Parties may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege in lieu of providing records, they shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged portion only. Settling Parties shall retain all records that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Parties’ favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

\_\_\_ No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]

[\_\_]. **RETENTION OF RECORDS**]<sup>11</sup>

[\_\_]. Until \_\_ years after the effective date of this Agreement, each Settling Party shall preserve and retain all [records] [if Access to Information Section is not used, insert “records, reports, or information (hereinafter referred to as “records”)] now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at

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<sup>11</sup> See n.10 *supra*.



the Site or to the liability of any person for response actions or response costs at or in connection with the Site, regardless of any corporate retention policy to the contrary.

\_\_\_\_. After the conclusion of the document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such record, and, upon request by EPA, Settling Parties shall deliver such records to EPA. Settling Parties may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged portion only. Settling Parties shall retain all records that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Parties' favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.]

### **XIII. CERTIFICATION**

28. Each Settling Party hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site, since notification of potential liability by the United States or the State or the filing of a suit against it regarding the Site and that it has fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

[If Settling Federal Agencies, insert, “ \_\_\_\_\_. The United States acknowledges that each Settling Federal Agency (1) is subject to all applicable Federal record retention laws, regulations, and policies; and (2) has fully complied with any and all EPA [and State] requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.”<sup>12</sup>]

### **XIV. NOTICES AND SUBMISSIONS**

29. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to

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<sup>12</sup> EPA attorneys must assure that the Agency has received a written response to any Information Requests that it has sent to Settling Federal Agencies containing a certification substantially similar to that required from private PRPs. *See* Paragraph 28.

the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA, Settling Parties[, and Settling Federal Agencies].

As to EPA:

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

[As to Settling Federal Agencies:]

As to Settling Parties:

[Insert name and address of one person who will serve as the contact for all Settling Parties]

#### **XV. INTEGRATION[/APPENDICES]**

30. This Agreement [and its appendices] constitute[s] the final, complete and exclusive Agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Agreement. [The following appendices are attached to and incorporated into this Agreement: "Appendix A is \_\_\_\_\_; etc."]

#### **XVI. PUBLIC COMMENT**

31. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, the United States may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

#### **XVII. EFFECTIVE DATE**

32. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 31 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Agreement.

IT IS SO AGREED:

[Settling Parties]

By: \_\_\_\_\_  
[Name]

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[Date]

U.S. Environmental Protection Agency

By: \_\_\_\_\_  
[Name]

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[Date]

U.S. Department of Justice

By: \_\_\_\_\_  
[Name]

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[Date]

[Insert title of appropriate DOJ official]  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

By: \_\_\_\_\_  
[Name]

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[Date]

Attorney  
U.S. Department of Justice  
Environmental Enforcement Section  
Environment and Natural Resources Division  
P.O. Box 7611  
Washington, DC 20044-7611

[If Settling Federal Agencies, insert]

By: \_\_\_\_\_  
[Name]

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[Date]

Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

## APPENDIX

### OPTIONAL PAYMENT OF ADDITIONAL RESPONSE COSTS PROVISION

**Insert the following definition in Section IV:**

[\_\_\_. “Additional Response Costs” shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA [or any other person]<sup>13</sup> incurs and pays at or in connection with the Site, to the extent such costs exceed \$ \_\_\_\_ [insert total response cost estimate upon which Settling Parties’ payment is based.]]”]

**Insert the following two paragraphs at the end of Section VI:**

[13.3. Payment of Additional Response Costs.]

a. Settling Parties shall pay to the EPA Hazardous Substance Superfund [\_\_%] [if Settling Federal Agencies, after % is specified for Settling Parties, insert “, and the United States on behalf of Settling Federal Agencies shall pay \_\_%] of Additional Response Costs not inconsistent with the National Contingency Plan. If Additional Response Costs are incurred, EPA will send Settling Parties [and Settling Federal Agencies] one or more bills requiring payment [of the specified percentage], which includes a [name standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors; also insert name of DOJ-prepared cost summary which would reflect any costs incurred by DOJ and its contractors]. Settling Parties shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 13.4 (Resolution of Disputes Concerning Payment of Additional Response Costs). Payment [if Settling Federal Agencies, insert, “by Settling Parties”] shall be made by certified check or checks or cashier’s check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making payment, the EPA Region and Site Spill ID Number \_\_\_\_\_, and the EPA Docket number for this action. Settling Parties shall send the check[s] to:

EPA-Superfund

[Insert appropriate Regional Superfund lockbox number and address]

b. At the time of payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID # \_\_\_\_\_ and the EPA docket number for this action.

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<sup>13</sup> If the Agreement concerns an enforcement-lead site at which PRPs may be performing the Additional Response Action, include “or any other person” in this definition.

c. The total amount to be paid by Settling Parties pursuant to Paragraph 13.3(a) (Payment of Additional Response Costs) shall be deposited by EPA in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. **[If part or all of the payment will be deposited in the EPA Hazardous Substance Superfund, rather than in a special account, insert appropriate language from the Note following Paragraph 13.0 of the model.]**<sup>14</sup>

**[If Settling Federal Agencies, insert the following Subparagraph.]** [d.] [The United States, on behalf of Settling Federal Agencies, shall make all Additional Response Cost payments as soon as reasonably practicable after receipt of each bill requiring payment, in the manner provided and consistent with Paragraph 13.1(a) above and subject to the limitations in Paragraph 13.2 above. In the event that an Additional Response Costs payment is not made by Settling Federal Agencies within 30 days of receipt of any bill, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the date of the bill and accruing through the date of the payment. Provided, that in the event any such Additional Response Costs are disputed by Settling Parties in accordance with Paragraph 13.4, below, the United States shall pay only that portion of the payment required under this Subparagraph (d) that is attributable to the costs that are undisputed by Settling Parties. The remaining portion of the amounts payable under this Subparagraph (d) that are attributable to disputed costs as to which the United States prevails pursuant to Paragraph 13.4, shall be paid as soon as reasonably practicable after the dispute is resolved, and any such delayed payment shall include Interest as provided in this Subparagraph (d) from the date of the original bill through the date of payment.]

#### 13.4. Resolution of Disputes with Settling Parties Concerning Payment of Additional Response Costs.

**[NOTE: Consider whether any ADR options should be included here.]**

a. Use of Dispute Resolution. The dispute resolution procedures set forth in this Paragraph shall be the exclusive mechanism for resolving disputes regarding Settling Parties' obligation to reimburse EPA for Additional Response Costs. The dispute resolution procedures in this Paragraph are limited to disputes regarding recovery of Additional Response Costs. Nothing in this Paragraph shall be deemed to create a right to pre-enforcement review of response actions taken by EPA.

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<sup>14</sup> If PRPs perform the additional response action at the Site pursuant to a settlement with the EPA, and Additional Response Costs are defined to include these PRP-incurred costs, it may be appropriate for some or all of these Additional Response Costs to be paid directly to the performing PRPs' trust fund or escrow account established pursuant to the work settlement.

b. Settling Parties may dispute all or part of a bill for Additional Response Costs submitted under this Agreement if Settling Parties allege that EPA has made an accounting error, or if Settling Parties allege that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Settling Parties shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 13.3 on or before the due date. Within the same time period, Settling Parties shall pay the full amount of the contested costs into an interest-bearing escrow account. Settling Parties shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 13.3(b) above. Settling Parties shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within \_\_ days after the dispute is resolved.

**[NOTE: The Regions should develop a record for the dispute and its resolution.]**

c. If Settling Parties object to any billing for Additional Response Costs, they shall notify EPA in writing of their objection(s) within \_\_ days of such action, unless the objection(s) has/have been resolved informally. EPA and Settling Parties shall have \_\_ days from EPA's receipt of Settling Parties' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

d. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the [insert Region-specific] level or higher will issue a written decision on the dispute to Settling Parties, which shall not constitute final agency action for purposes of judicial review. EPA's decision shall be incorporated into and become an enforceable part of this Agreement. Following resolution of the dispute, as provided by this Section, Settling Parties shall make payment in accordance with the agreement reached or with EPA's decision, whichever occurs, and Paragraph 13.4(b) above.]